

## Decision of the European Ombudsman closing the inquiry into complaint 1962/2013/JN against the European Commission

Decision

**Case** 1962/2013/JN - **Opened on** 18/11/2013 - **Decision on** 20/01/2015 - **Institution concerned** European Commission ( No maladministration found ) |

The case concerned the fairness of the recovery by the European Commission of part of its financial contribution to the complainant, a company, in the context of an EU funded project. The Commission admitted that it had made some errors in its calculation of the amount to be recovered, and apologised. It also waived part of its claim for "liquidated damages", considering that it would be disproportionate. In these circumstances, the Ombudsman considered that there was no on-going maladministration and took no further action.

### The background to the complaint

1. On 17 December 2003, the complainant and the Commission entered into a grant agreement ('Agreement 1') for the purposes of a project. The EU undertook to contribute a maximum of EUR 598 000 as a grant.
2. On 6 December 2006, the complainant and the Commission entered into another grant agreement ('Agreement 2') for the purposes of a project. The EU undertook to contribute a maximum of EUR 477 060 as a grant.
3. Between 16 and 19 March 2010, the Commission carried out an audit of the complainant's books. On 22 October 2010, a draft audit report was sent to the complainant. On 19 November 2010, the complainant challenged its findings.
4. On 16 December 2010, the Commission confirmed the findings of the audit. The eligible costs were corrected downwards by EUR 382 580.90. The final audit report was sent to the complainant together with the Commission's reply to the complainant's comments on the draft audit report. The complainant was informed about the implementation of the findings of the audit, and, in particular, that the corrections might affect future payments or result in recovery. The Commission added that it might claim liquidated damages [1] .



5. On 26 June 2012, the Commission informed the complainant that two recovery orders would be issued shortly: the first, for EUR 168 269.18, with respect to Agreement 1; and the second, for EUR 135 456.33, with respect to Agreement 2.

6. On 3 August 2012, the complainant replied, insisting that it had faithfully and fully delivered the objectives of the contracts within the agreed time and budget. The recovery would lead to the complainant's bankruptcy. The complainant added that the company had been founded to serve the aims and interests of the Commission, and had done so successfully for more than 10 years.

7. On 21 and 23 January 2013, the Commission issued two debit notes: the first, for EUR 168 269.18, with respect to Agreement 1; and the second, for EUR 135 456.33, with respect to Agreement 2.

8. On 19 February 2013, the Commission informed the complainant that it intended to claim EUR 58 790.79 as liquidated damages for Agreement 1 and EUR 39 033.50 as liquidated damages for Agreement 2.

9. On 1 March 2013, the complainant wrote to the Commission suggesting a meeting and requesting clarifications. The complainant reiterated its disagreement and pointed to inconsistencies in the Commission's calculations. On 26 March 2013, the complainant sent further correspondence.

10. On 20 June 2013, the Commission replied to the complainant. It had reviewed the file and confirmed its position. Reminding the complainant that it had still not paid the requested amounts, the Commission requested payment with default interest.

11. On 2 August 2013, the complainant reiterated its disagreement and once again requested a meeting with the Commission.

12. On 16 October 2013, the complainant turned to the European Ombudsman.

## **The inquiry**

13. The Ombudsman opened an inquiry into the following allegation and claim:

The Commission's recovery of the amounts claimed is unfair. The Commission should stop the recovery.

14. In addition to inviting the Commission to address the allegation and claim, the Ombudsman invited it to explain why it waited over a year and a half after finalising the audit report before launching the recovery procedure. The Ombudsman noted that such a delay seems at first sight excessive, taking into account the principles of sound financial management and legal certainty.



**15.** In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's opinion. Regrettably, the Commission's opinion was delayed by more than three months after the specified time limit. Subsequently, the complainant requested a three-month extension of the deadline for submitting its observations—which was granted by the Ombudsman. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

## **Allegation of unfair recovery**

### **Arguments presented to the Ombudsman**

**16.** The complainant argued that the Commission had given inconsistent information concerning the amounts to be recovered. These inconsistencies suggested that the liquidated damages might have been miscalculated. In addition, the complainant pointed out that the Commission had approved the contents and the budgets of all the complainant's projects, on the basis of periodic reports.

**17.** The complainant further submitted that the Commission should take into account that the recovery could result in the bankruptcy of the complainant, a company which had successfully carried out a number of EU-funded projects in the past and cooperated with the Commission in good faith during the execution of the projects and the audit.

**18.** In its opinion, the Commission acknowledged that its calculations contained several errors and apologised for the confusion. The Commission further acknowledged a delay in implementing the results of the audit but explained that this was due to its effort to take into account "all possible data and justifications", before implementing the audit, and in view of the potential impact on the complainant. The Commission attempted to strike a balance between the need to recover the public funds to which there was no entitlement and the effort to take into account the complainant's assertion that the recovery could lead to its bankruptcy.

**19.** The Commission provided a detailed calculation of the amounts claimed and corrected the errors in the calculation. As regards Agreement 1, the error in the Commission's initial calculation was in favour of the complainant since the correct principal amount to be recovered should have been EUR 198 388.04 instead of EUR 168 269.18. With respect to Agreement 2, the calculation also contained an error but the principal amount to be recovered, that is EUR 135 456.33, was correct. The liquidated damages for Agreement 1 should have been EUR 64 635.50 instead of EUR 58 790.79. The Commission said that it believes it is entitled to recover the EU funds paid and to which there was no entitlement. It would issue the corresponding corrected debit notes once the complainant had been given the opportunity to submit comments on the corrected amounts.

**20.** Addressing the issue of proportionality, the Commission stated that it is obliged to recover



public money from a contractor which has breached the terms of an EU contract. The fact that the contractor may have been funded in other EU projects in the past or that it may have acted in good faith does not mean that it should keep funds to which it is not entitled. Nonetheless, taking into account the above circumstances and the impact that the recovery of liquidated damages might have on the complainant, the Commission decided not to claim liquidated damages for Agreement 1. It also undertook to inform the complainant that additional time for payment might be allowed.

**21.** As regards the approval of the complainant's periodic reports, the Commission explained that it is only during subsequent audits that submitted costs are checked against the requisite supporting documents which contractors have to keep in order to prove their expenditure. In fact, the Commission follows a trust-based approach, which means that its analysis of financial reports is based on the costs *claimed*. In order to facilitate work and to avoid delays in the implementation of the projects, the payments are made on the basis of the periodic reports and the cost (self)-declarations by contractors. Supporting documents need not be systematically sent. This approach is balanced by a system of audits. According to Article II.8.4 of the General Conditions of the Contract: "*Approval of any report does not imply exemption from any audit or review, which may be carried out in accordance with the provisions of Article II.29.*"

**22.** In its observations, the complainant contested the conditions under which the audit had been carried out and its results. It claimed that the Commission failed to explain the inconsistencies in its calculations and should annul the remaining recovery orders/debit notes.

## The Ombudsman's assessment

**23.** The Ombudsman notes that the Commission corrected the errors it identified in its calculation of the amounts to be recovered, and apologised. Applying the principle of proportionality and taking into account the confusion that may have been created, it also waived its claim for liquidated damages for Agreement 1 and undertook to inform the complainant that additional time for payment might be allowed. The Commission also provided a convincing explanation of the system of periodic reporting (see paragraph 21 above).

**24.** Under these circumstances and taking into account the fact that the complainant has not submitted any relevant arguments which cast doubt on the Commission's new calculation, the Ombudsman concludes that there is no on-going maladministration on the part of the Commission.

## Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion:

**There is no on-going maladministration on the part of the European Commission and no**



**further inquiries are justified.**

The complainant and the Commission will be informed of this decision.

Emily O'Reilly

Strasbourg, 26/01/2015

Final English version of the decision on complaint **1962/2013/JN**

[1] In accordance with the General Conditions, liquidated damages (compensation calculated according to a formula provided for in the General Conditions) may be claimed from a contractor which is found to have overstated expenditure and has consequently received unjustified payment.